

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

24 A.D. 2d 751, and.

ORIGINAL

1031
75-7073

United States Court of Appeals

For the Second Circuit.

AUDREY WEINER, AS ADMINISTRATRIX OF THE
ESTATE OF JULIE A. WEINER, DECEASED,
Plaintiff-Appellant-Appellee,

-against-

BARBARA WEINER, LOUIS B. WEINER, BARRY STONE,
JANE STONE, GREYHOUND BUS LINES, INC., and
RONALD BROWN,

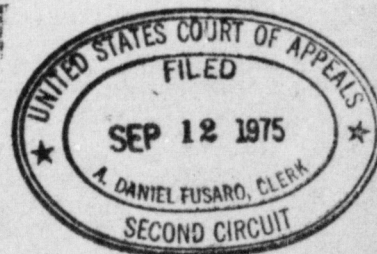
Defendants-Appellees-Appellant.

*Appeal from the United States District Court
for the Eastern District of New York*

APPELLEE'S BRIEF

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3

TABLE OF CONTENTS

	Page
Statement of Facts.....	1
Statement of Proceedings Below.....	2
Statement of the Issue to be Reviewed.....	4
POINT I - The Dismissal of the Complaint Against Defendants Barry And Jane Stone Has Not Been Challenged.....	5
Conclusion.....	6

STATEMENT OF FACTS

On March 7, 1971, the WEINER car driven by BARBARA WEINER, was proceeding easterly along Route 149 at about 5 P.M. Visibility was good, it was still light out and although it was not snowing at the time, there had been some snow earlier in the day.

While on Route 149, the car began the 800 foot descent down Ox Bow Hill. The STONE car followed behind. The road consisted of two ten foot wide lanes, one in each direction and it curved to the left. The lanes were separated by a double yellow line. There was slush along both shoulders of the road, as well as some patches on Route 149 itself.

Travelling up Ox Bow Hill was a Greyhound bus operated by RONALD BROWN.

The WEINER car, while on the curve at a speed of about 40 miles per hour, left the road to the right shoulder. The car hit a mound of slush and the guardrail. It returned to the eastbound lane and at a diagonal angle, crossed the yellow line into the westbound lane and sheered off the front end of the bus. The STONE car, passing in an attempt to avoid the accident to its left was struck by the WEINER car.

JULIE, daughter of BARBARA WEINER was killed as a result of the accident. The other members of the WEINER

family either could not remember or did not know how the accident happened.

STATEMENT OF PROCEEDINGS BELOW:

The action was brought in the United States District Court for the Eastern District of New York, and came on for trial on September 27, 1974, before Judge John F. Dooling, Jr. and a jury.

Prior to the trial, the first and second causes of action on behalf of Plaintiff ALAN VANCE WEINER were discontinued for lack of jurisdiction in the Federal forum. Plaintiff's action on behalf of the estate of JULIE A. WEINER continued, and at the close of plaintiff's case, the third cause of action for conscious pain and suffering was withdrawn.

At this time, the Trial Court dismissed the complaints as to defendants GREYHOUND, BROWN and the STONES. Plaintiff then, with the Court's permission, voluntarily discontinued the action against defendant LOUIS B. WEINER and the case was submitted to the jury on the issue of the negligence of defendant BARBARA WEINER severally, and the issue of damages.

A jury verdict was returned in defendant's favor on October 3, 1974.

A written motion was made to set aside the verdict on the grounds that it was contrary to the weight of the evidence, that the dismissal of the complaint as to defendants GREYHOUND and BROWN was erroneous, that erroneous, prejudicial evidence was admitted as to the "interest" of defendant BARBARA WEINER in the outcome of the trial, and material errors in the charge as to the degree of proof in a death action and the right of the estate to maintain the action. The motion also asked for a mistrial on the basis of defense counsel's improper and prejudicial summation.

By his decision dated December 20, 1974, Judge Dooling denied the motion in all respects. This appeal is taken from the judgment entered on the verdict, and the order denying the motion to set the verdict aside, and each and every part thereof.

STATEMENT OF THE ISSUE TO BE REVIEWED:

1. The propriety of the Trial Court's dismissal of the complaint against the defendants BARRY and JANE STONE is not properly before this Court for review.

POINT I

THE DISMISSAL OF THE COMPLAINT
AGAINST DEFENDANTS BARRY AND
JANE STONE HAS NOT BEEN
CHALLENGED.

The issue of the liability of defendants BARRY AND JANE STONE is not properly before this Court for review.

At the close of the plaintiff's case, the Trial Court properly withdrew from the consideration of the jury the issue of the liability on the part of defendants BARRY AND JANE STONE and the propriety of that action has at not time been challenged. In its statement of the issues to be reviewed, Appellant makes no challenge to the dismissal of the complaint as to defendants BARRY AND JANE STONE, commenting on the dismissal as to defendants STONE in his summation, counsel for plaintiff stated:

"I agree. They weren't involved." (Appendix, p. 571).

A motion was made to set aside the verdict on the grounds that the dismissal of the complaint as to defendants GREYHOUND BUS LINES INC., and BROWN was erroneous. No such claim of error was ever made as to the dismissal against defendants BARRY AND JANE STONE.

CONCLUSION

The dismissal of the complaint as to defendants BARRY AND JANE STONE was proper, it has not been challenged and the issue of their liability should not be reviewed.

Respectfully submitted,

JOHN B. ACHARY, P.C.
Attorney for Defendants-
Appellees BARRY & JANE STONE

W. anner v. Weiner - Zachary

STATE OF NEW YORK)
: SS.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 12 day of Sept., 1975 deponent served the within Brief upon Spatt + Bauman

attorney(s) for

appellant

in this action, at

225 W. 34th St
New York, NY

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.


ROBERT BAILEY

Sworn to before me, this

12 day of Sept., 1975.


WILLIAM BAILEY

Notary Public, State of New York
No. 43-0132945

Qualified in Richmond County
Commission Expires March 30, 1976